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IN THE

Supreme Court of the United States

October Term, 1980

THE HEPPENSTALL COMPANY,
Petitioner,

vs.

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

ERISA was enacted to protect employee pension expectations. Petitioner contends it also dismantled the only buttress upholding those expectations before the Act's passage, the direct liability that some employers had pledged to provide pension benefits.

1. Before the decision below, no other circuit court had considered the enforceability, under ERISA, of the direct liability which an employer had voluntarily assumed, or collectively bargained, to provide pension benefits.[1] The issue's rarity was predictable. An employer retains the obligation to provide benefits because it believes that employees should receive the pension benefits it has promised them. It is not likely to evade that obligation through litigation. This fact alone lessens the chance that the issue will arise with any frequency. If we overestimate employers' intentions and another, besides petitioner, disavows the liability it had assumed, then this Court will again have the opportunity to weigh the contention that ERISA extinguishes its obligations under a plan.

2. While the issue raised is of consequence to the thousands of employees who enjoy the benefits their employers guarantee, it is also one of obvious resolution. It is the resolution which the statute's language and purpose, and this Court's analysis in *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359 (1980)[2] compel. The Third Circuit adopted this resolution when it held that ERISA authorizes the enforcement of an employer's direct liability. Thus, the petition presents no substantial issue worthy of this court's review.

Introduction

As this court has noted, a defined benefit plan like petitioner's is one "under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide

[1] The question did arise in two bankruptcy proceedings. *In re Alan Wood Steel Co.*, 212 BNA Pension Reporter, D-1 (E.D. Pa. 1978); *In the matter of M & M Transportation Company*, 228 BNA Bankruptcy Reporter, D-4 (S.D. N.Y. 1980). Both reached the same result as did the Circuit Court here.

[2] Hereinafter "*Nachman*."

those benefits." *Alabama Power Co. v. Davis*, 431 U.S. 581, 593, n.18 (1977). We will distinguish between two types of defined benefit plans: those in which the employer retains direct liability to provide benefits and those in which it disclaims liability.[3] While employers typically adopt disclaimers,[4] a sizable number retain direct liability.[5]

The extent of an employer's liability obviously affects employees' security in their pension expectations. Only employer insolvency threatens the receipt of benefits for which an employer is directly liable. *Nachman*, 446 U.S. at 379. Where the employer disclaims liability, however, the receipt of benefits ultimately depends upon its continued willingness to fund the plan. If that willingness ends while accrued pension liabilities exceed accumulated contributions, participants' benefits are reduced or eliminated and their expectations go unfulfilled.

The prevalence of liability disclaimers, which employers invoked in terminating plans, had a

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[3] The employer typically effects the disclaimer through a series of plan provisions. These establish a pension fund, require employer contributions to the fund, absolve the employer of any responsibility other than making contributions, permit employer termination of the plan and discontinuance of contributions, and specify that participants may look only to the fund, and not to the employer, for the payments promised under the plan. *See* D. McGill, *Fundamentals of Private Pensions*, 158-9 (3rd Ed. 1975). The attraction of a disclaimer is obvious, since it offers a control upon costs of otherwise "unknown magnitude and indeterminate duration." D. McGill, *Fundamentals of Private Pensions*, 103 (2d Ed. 1964) ERISA authorizes employers to include such disclaimers in their plans. *Nachman*, 346 U.S. at 385, n.35.

[4] *Nachman*, 446 U.S. at 378.

[5] *See, e.g.*, D. McGill, *Employer Guarantee of Pension Benefits*, 21-38, 39 (1974). In the steel industry such guarantees are found in plans covering hundreds of thousands of participants. *See, e.g.*, Prentice—Hall, *Pension and Profit Sharing Forms*, ¶51,104.

"disastrous effect"[6] on participants and spurred ERISA's enactment. *Nachman*, 446 U.S. at 378-79, n.28, 29 U.S.C. §1001(a). ERISA offered two responses. As a preventive measure, it imposed *minimum* requirements to foster sounder funding of plans. §§2(a), 2(c) and 302, 29 U.S.C. 1001(a), 1001(c) and 1082. These requirements did not eliminate the possibility of plans terminating without adequate funding. Thus, as a remedial measure, ERISA created a termination insurance scheme under which the Pension Benefit Guaranty Corporation ("PBGC") provides some of the benefits of a terminated, underfunded plan. §§2(a), 2(c) and 4001 *ff*, 29 U.S.C. §§1001(a), 1001(c) and 1301ff.[7] Remarks by Senator Bentsen, II Leg. Hist. 1637.[8]

This background, which *Nachman* recited, aids in appreciating the Circuit's faithfulness to that decision and the utter accuracy of its conclusion that "nothing in ERISA, nor in its legislative history . . . discountenances direct contractual recovery of pension benefits from the employer."

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[6] Remarks by Senator Curtis in II Legislative History of Employee Retirement and Income Security Act of 1974 at 1649 (Hereinafter "Leg. Hist.").

[7] The guarantee covers only basic benefits, as defined in §4022, 29 U.S.C. §1322. Among the benefits the definition excludes are fixed dollar supplements to employees not yet eligible for social security benefits, 29 CFR §2605.4(a)(1), and full benefits derived from plan amendments adopted in the five years before termination. 29 U.S.C. §1322. Under the petitioner's interpretation of the statute, a participant could never enforce plan terms providing non-basic benefits.

[8] Congress perceived another problem affecting the nation's private pension system: the absence of adequate state and federal remedies to safeguard "the security of anticipated benefit rights in private plans." S. Rep. No. 93-127, 93d Cong., 1st Sess. at 5, I Leg. Hist. 591. Thus, in enacting ERISA Congress determined to provide "appropriate remedies, sanctions, and ready access to the Federal Courts." ERISA §2(b); 29 U.S.C. §1001(b); See, also, Senate Report 93-127, 93d Cong., 1st Sess., 35, I Leg. Hist. 621.

I. ERISA Authorizes Direct Employer Liability.

Nachman accepted as given that ERISA authorized an employer's direct liability for pension benefits.[9] It stated that an "employee could sue the employer directly" upon such liability. 446 U.S. at 379, n.29. It reasoned that the ERISA's limitation on employer's liability to the PBGC for unfunded, basic benefits could not assist the directly liable employer since the limitation "would not be applicable to protect the employer in lawsuits brought directly against it." 446 U.S. at 385, n.37.[10]

Nachman could accept the postulate on which its analysis rested since direct liability furthered so many of ERISA's legislative purposes. The employer guarantee of benefits, while not required by ERISA, still fosters "the equitable character of such plans and their financial soundness." §2(a); 29 U.S.C. 1001(a). It also "encourage[s] the continuation and maintenance of voluntary private pension plans for the benefit of their participants." §4002(a)(1); 29 U.S.C. §1302(a)(1). Finally, it makes more likely "the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans." §4002(a)(2); 29 U.S.C. §1302(a)(2). As *Nachman* noted, Congress recognized that plan terminations, and the resulting benefit reductions,

[9] This Court is not alone in assuming that post-ERISA guarantees remain valid and enforceable. Professor McGill, a noted commentator on pension matters, endorsed the concept of direct liability shortly after ERISA's enactment. D. McGill, *Employer Guarantee of Pension Benefits*, 7-8 (1974).

[10] *Nachman* evaluated the post-ERISA validity of disclaimers at length and concluded ERISA permitted disclaimers since their prohibition would hamper the very growth of pension plans which Congress desired. 446 U.S. at 385, n.35. Such disclaimers would have no nuturing effect, however, if ERISA precluded direct liability. In that case, as the Third Circuit noted, "*Nachman* would nonsensically permit restrictions on a form of liability the statute had precluded." (Pet. App. 13a).

stemmed largely from "the absence of any direct guarantee by the employer" in the typical plan. 446 U.S. at 378-79, n.28. *Nachman* had no reason to believe that Congress had banned the only protection against benefit reductions which predated ERISA.

Nachman answers petitioner's wholly frivolous argument that §411(d)(3) of the Internal Revenue Code, 29 U.S.C. §411(d)(3), requires that terminated plans vest only funded benefits.[11] There the court took note of ERISA's minimum vesting requirements, the more important being those of §203(a)(2) which mandate vesting at given years of service. 29 U.S.C. §1053(a)(2). Both the majority and the dissenters agreed that ERISA would invalidate any plan provision under which participants would forfeit unfunded benefits vesting under these standards. 446 U.S. at 366, n.10; and *id.* at 390, n.8 (dissent).[12]

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[11] Petitioner never expressly identifies which of ERISA's provisions requires disclaimers. It does, however, style plan Section 10.2 as its disclaimer (Pet. at 11) and contend that this section was adopted in order to comply with Code §411(d)(3). (Pet. at 9). From this we infer it views §411(d)(3) as the provision which requires disclaimers and bans direct liability.

[12] Totally aside from *Nachman*, this argument would fail. §411(d)(3) conformed to ERISA the longstanding requirement of §401(a)(7) Pub. Law 87792, that accrued benefits vest on termination to the extent they are funded. Petitioner cannot argue that §401(a)(7) required disclaimers or precluded direct liability since the pre-ERISA tax regulations clearly recognize disclaimers as permissible, not mandatory. Tres. Regs. 1-401-2(b)(2); 1-401-1(b)(2) (1956). What is more, petitioner's interpretation of §411(d)(3) would lead to the absured conclusion that the PBGC insures no benefits. With certain irrelevant exceptions, the PBGC guarantees:

> "all non-forfeitable benefits (other than those becoming non-forfeitable solely on account of the termination of a plan.) . . . ." ERISA §4022, 29 U.S.C. §1322.

If, as petitioner must argue, §411(d)(3) required the forfeiture of otherwise vested benefits, then §4022, which itself excludes §411(d)(3) benefits, would define the null set. Obviously, two classes of vested benefits exist at termination: those gained under the normal vesting schedule and those which, under §411(d)(3), vest solely on account of the plan's termination.

Petitioner also argues that ERISA's funding requirements prohibit direct liability. These requirements are minima, however, which employers may freely exceed.[13] Analogously, while it must always meet the funding requirements, the employer can volunteer additional security for benefits, such as its direct liability. In doing so, it furthers one of ERISA's chief goals: assuring to participants the receipt of their promised benefits. *Nachman*, 446 U.S. at 375.

Petitioner finally contends that ERISA limits an employer's liability to those amounts the PBGC may collect for unfunded, insured benefits under §4062. 29 U.S.C. 1362(a). The argument does not rely on the provision's language, which simply sets out the liability to the PBGC and says nothing about liability to participants. Rather, petitioner mines the legislative history and there discovers the Congressional concern that imposing unlimited liability on employers might retard growth of the nation's pension system. *Nachman*, 446 U.S. at 379-80, n.30.[14]

While Congress chose not to impose direct liability, nothing in the legislative history reflects a concern over an employer's voluntarily assuming that liability. Allowing that assumption would not deter the growth of plans since employers remain free to limit their liability. *Nachman*, 446 U.S. at 385, n.35. But the employer can also, either unilaterally or through collective bargaining, exercise the freedom ERISA affords to "work out the pension programs best suited"[15] to its

[13] Conference Report, III Leg. Hist. at 4550; Remarks of Senator Bentsen, III Leg. Hist. at 4791.

[14] See, S. Rep. No. 93-383, 93d Cong. 1st Sess. 87, I Leg. Hist. 1155; H. Rep. No. 93-533, 93d Cong. 1st Sess. 16, II Leg. Hist. at 2363.

[15] Remarks of Sen. Bentsen, II Leg. Hist. 1637.

needs and retain direct liability. That exercise promotes both the growth of plans and the security of their benefits.

II. ERISA Provides An Action To Enforce An Employer's Liability.

Petitioner also contends that ERISA provides no action against an employer on his liability under a plan. Were this interpretation correct, ERISA's sanction of direct liability would be inconsequential since participants could not enforce it.[16] But ERISA does not deny participants this remedy.

Nachman repeatedly noted that participants could enforce an employer's direct liability. The court emphasized that the post-ERISA utility of disclaimers lies in "protect[ing] the employer in lawsuits by employees brought directly against it." 446 U.S. at 385, n.37. It appreciated that the PBGC could not stop employees from suing the employer directly on his liability. *Id.* at 383.

Nachman accurately reflects the breadth of the ERISA action. ERISA Section 502 authorizes a participant to bring suits "to recover benefits due him under the terms of his plan" and to "enjoin any act . . . which violates . . . the terms of the plan or . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce . . . the terms of the plan." §502(a)(1)(B) and (3); 29 U.S.C. §1132(a)(1)(B) and (3). If direct liability is among

[16] ERISA preempts state law. ERISA §514(a); 29 U.S.C. §1144(a). While it permits certain actions in state courts, these can be no broader than those over which the federal courts have concurrent jurisdiction. ERISA §502(e)(1); 29 U.S.C. §1132(e)(1). Thus, if there is no federal remedy against an employer who violates his guarantee, there is no remedy at all.

the plan's terms, a participant may enforce it pursuant to Section 502.[17]

While it authorizes suits against plans as entities,[18] Section 502 has a broader reach.[19] It accomplishes ERISA's goal of providing "ready access to the courts." §2(a); 29 U.S.C. §1001(a). Participant actions against employers are necessary to ERISA's effectiveness. Only employers, not the plan, can answer an action for inadequate funding. Similarly, only employers can discharge the liability that a provision for direct liability imposes.

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[17] Petitioner's collectively bargained plan states that its benefits "shall be provided or caused to be provided by the Company." Pet. App. at 6a. Petitioner contends that it circumscribed this direct, unconditional liability when, at the request of the IRS, it amended Section 10.2 of the plan. *Id.* at 76a. The amendment tracks the language of Code §411(d)(3) and vests accrued, funded benefits at termination. It is only a vesting provision whose scope it measures by reference, to funding. It is not the only vesting provision, however ERISA would invalidate any attempt to limit vesting to funded benefits. *Nachman*, 446 U.S. at 336, n.102.

[18] §502(d)(1); 29 U.S.C. §1132(d)(1).

[19] If, as petitioner contends, Section 502 authorized actions against plans alone, then Congress would not have provided that a judgment "under this title against an employee benefit plan shall be enforceable only against the plan." §502(d)(2); 29 U.S.C. §1132(d)(2). Such judgments would necessarily be against the plan.

The lower courts have construed Section 502(a) as providing a direct action against employers in a number of situations. *See, e.g., Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188 (E.D. Mo. 1980) (enforcing employer's direct liability under a benefit plan); *Bittner v. Sadoff & Rudoy Industries*, 490 F. Supp. 534 (E.D. Wis. 1980) (employer liability for discrimination); *Huge v. Old Home Manor, Inc.*, 419 F. Supp. 1019 (W.D. Pa. 1976) (employer liability for contributions). No decision holds that Section 502(a) excludes actions on an employer's individual liability. Of course, some courts have denied recovery against employers where plaintiffs fail to state a claim. *See, e.g.*, cases cited in Pet. at 15, n.26.

III. The Plan's Arbitration Clause Does Not Govern A Dispute Over The Enforceability Of The Employer's Direct Liability.

The Third Circuit held that a retiree's dispute over his employer's direct liability falls outside the plan's provision[20] for arbitration of applicant's claims for benefits. The Circuit soundly reasoned that retirees are not applicants and that the validity of the employer's guarantee does not involve the amount of or right to a benefit. Thus, the plan's arbitration clause did not apply.[21]

Despite petitioner's contrary assertion, the circuit did not "refus[e] to enforce the arbitration clause." Pet. at 22. Its comprehensive analysis of the provision's scope is ample evidence that the circuit presupposed the enforceability of the clause.[22] Thus, there is no conflict between the decision below and those of other circuits which have enforced provisions for arbitrating pension disputes.[23]

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[20] Pet. App. at 6a. Petitioner did not claim before the Circuit Court that the arbitration provisions of the collective bargaining agreement applied to this dispute.

[21] We do not understand petitioner to argue that a mis-interpretation of this particular clause would present an important issue of federal law warranting review here.

[22] Respondents had argued that retirees are not required to exhaust such procedures in Section 502 actions, an argument the circuit found unnecessary to address.

[23] *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *Challenger v. Local Union No. 1, Ironworkers*, 619 F.2d 645 (7th Cir. 1980).

Conclusion

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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